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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Baxley

Mailed: November 23, 2005

Opposition No. 91160266

Christopher Brooks

v.

Creative Arts By Calloway, LLC

Before Seeherman, Bucher and Drost,
Administrative Trademark Judges

By the Board:

This case now comes up for consideration of opposer's motion (filed December 30, 2004) for summary judgment on his likelihood of confusion claim. The motion has been fully briefed.

As an initial matter, we note that opposer's reply brief consists of ten pages of argument preceded by three pages consisting of a table of contents and a table of authorities. Although these tables are not required in a brief filed in connection with a motion, if such tables are included, they are considered in the page count of the brief. See Trademark Rule 2.127(a); *Saint-Gobain Corp. v. Minnesota Mining and Manufacturing Co.*, 66 USPQ2d 1220 (TTAB 2003). Inasmuch as opposer's reply brief in support of his motion for summary judgment exceeds the ten-page limit for reply briefs in connection with motions in Board inter

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partes proceedings, that brief has received no consideration, but we have considered the rebuttal evidence submitted therewith.

We turn next to opposer's motion for summary judgment. After reviewing the parties' arguments and evidence, we find that opposer has not met his burden of establishing that there are no genuine issues of material fact and that he is entitled to entry of judgment as a matter of law. At a minimum, there is a genuine issue of material fact as to the relatedness of opposer's goods and services and those of the applicant.¹ Accordingly, opposer's motion for summary judgment is denied.²

¹ We note that the parties were involved in a civil action in the United States District Court for the Southern District of New York styled *Creative Arts by Calloway, LLC v. Brooks*, No. 01 Civ. 3192 (CLB), S.D.N.Y., December 11, 2001), aff'd, No. 02-7050 (2d Cir. October 11, 2002). However, it is not clear that applicant's services that are the subject of the application in this case were addressed by the courts in those prior proceedings. Therefore, we cannot give that decision preclusive effect in this motion for summary judgment.

² Applicant is entitled to prove an earlier use of the CAB CALLOWAY mark in connection with the recited services in International Classes 35 and 41 than its intent-to-use application filing date. However, such proof must be clear and convincing and must not be characterized by contradiction, inconsistencies and indefiniteness. See *Hydro-Dynamics, Inc. v. George Putnam & Co., Inc.*, 811 F.2d 1470, 1 USPQ2d 1772 (Fed. Cir. 1987).

The fact that we have identified only one genuine issue of material fact as a sufficient basis for denying the motion for summary judgment should not be construed as a finding that this is necessarily the only issue which remains for trial.

The parties should note that the evidence submitted in connection with their motions for summary judgment is of record only for consideration of those motions. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. See *Levi Strauss &*

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Proceedings herein are resumed. Discovery remains closed. Trial dates are reset as follows.

Plaintiff's 30-day testimony period to close: **02/24/06**

Defendant's 30-day testimony period to close: **04/25/06**

15-day rebuttal testimony period to close: **06/09/06**

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

Co. v. R. Josephs Sportswear Inc., 28 USPQ2d 1464 (TTAB 1993); *Pet Inc. v. Bassetti*, 219 USPQ 911 (TTAB (1983); *American Meat Institute v. Horace W. Longacre, Inc.*, 211 USPQ 712 (TTAB 1981).